No. 89-1611

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

TIMOTHY SCOTT REESE,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the search of a jacket found on a chair in an apartment, belonging to a visitor (petitioner) to the apartment, was included within the scope for a warrant to search the apartment for drugs and other contraband?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Commonwealth of Pennsylvania respectfully prays that petitioner Timothy Scott Reese's request that a writ of certiorari issue to review the decision of the Supreme Court of Pennsylvania, which became final on January 5, 1990 be denied.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person's or things to be seized.

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

COUNTERSTATEMENT OF THE CASE

On or about March 22, 1985, members of the Pennsylvania State Police, Drug Law Enforcement Division, obtained a search warrant for 93 Main Street, Apt. D in Luzerne, Pennsylvania. The warrant authorized the search of the premises and of the person of one Tina Cosgrove, the known resident of the apartment. The warrant further authorized a search for cocaine and any and all controlled substances and any drug paraphernalia. The search warrant and affidavit also stated that petitioner Timothy Scott Reese, was an associate of Cosgrove, had been observed in the apartment and had been a target of drug law enforcement investigations.[1]

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1. The affidavit of probable cause stated in relevant part as follows:
(Cont'd)

Upon entering the apartment, the officers read the warrant to Mrs. Cosgrove and undertook the search. Present in the apartment beside Mrs. Cosgrove were her three (3) children and two (2) adults, Jerome Dunbar and petitioner. Petitioner Reese was in the kitchen while Dunbar was in the living room.

During the course of the search, which uncovered a quantity of controlled substances, Officer Carl Allen, who was assigned to watch Cosgrove and petitioner, observed a black leather jacket draped over a kitchen chair located approximately four (4) feet away from him. Without knowing who the jacket belonged to but suspecting that it contained contraband, Trooper Allen searched the black leather jacket and discovered metal knuckles in the coat pocket. Petitioner acknowledged ownership of the jacket and subsequently, was arrested and charged with the possession of "brass knuckles," a prohibited offense under the Crimes Code. 18 Pa.C.S.A Subsection 908 (Purdons, 1983). Upon leaving the apartment after his arrest, petitioner voluntarily took and wore the jacket from which the knuckles were removed.

HOW THE FEDERAL QUESTION WAS PRESENTED

Respondent Commonwealth of Pennsylvania concurs in the summary regarding presentation of the federal question as set forth in Petitioner's Petition for Writ of Certiorari, page 5.

(Cont'd)

1. According to Confidential Informant, one Timothy Reese, an associate of Cosgrove has been observed in Apt. D at the 93 Main Street address. Reese is a known drug user and has been the target of law enforcement investigations of the Region VIII Strike Force at Kingston.

REASONS FOR DENYING THE WRIT

I.

The decision of the court below is compatible with decisions and principles of the United States Supreme Court.

The petitioner has advanced the argument that there is no constitutional difference between the search of a visitor's person and the search of a visitor's personal effects located on the premises where a search warrant is being executed and that, therefore, the decision of the Pennsylvania Supreme Court which allowed police to extend a search warrant to include the personal effects of a visitor to the premises is violative of prior decisions and principles of the Supreme Court of the United States.

The Fourth Amendment of the United States Constitution which has been held applicable not only to the federal government but also to the state under the due process clause of the Fourteenth Amendment directs that, "no warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched and the persons or things to be seized." United States Constitution, Amendment IV. The Pennsylvania Constitution, further requires that "no warrant to search a place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause." Pennsylvania Constitution, Article 1, Subsection 8. The objective of the particularity requirement is to protect the citizenry from general warrants giving the bearer an unlimited authority to search and seize. *Wolfe v. Colorado,* 338 U.S. 25, 27-28, 69 S. Ct. 1359, 1361, 98 L. Ed. 1782. Indeed, in *Maryland v. Garrison,* 480 U.S. ____, 107 S. Ct. 1013, 1017, 94 L. Ed. 2d 72, 80 (1987), this Court found that this "requirement ensures that the search will be carefully tailored will not take on the character of the wide-ranging

exploratory searches the Framers [of the Constitution] intended to prohibit."

In *United States v. Ross*, 456 U.S. 798, 820-821 (1982), furthermore, this Court noted that where a search warrant adequately describes the place to be searched and the persons and/or things to be seized, the scope of the search "extends to the entire area in which the object of the search may be found", and properly includes the opening and inspection of containers and other receptacles where the object may be secreted. In addition, the *Ross* Court observed as follows:

> [T]o search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a foot locker to search for marijuana would also authorize the opening of packages found inside. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search.

Id. at 821-822.

This Court further discussed the scope of a lawful search in *Maryland v. Garrison*, 480 U.S. ____, 108 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), *citing United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). The Court in *Ross* stated that the purview of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found." The Court further illustrated this concept as follows:

> Just as probable cause to believe that a stolen lawnmower may be found in a garage will not

for a preliminary injunction, C&NW and DM&E consummated the sale on September 4, 1986, and DM&E commenced operations on the line the next day (J.A. 189-90). The district court later granted summary judgment for the railroads (App. 26a-27a), and the Eighth Circuit affirmed, holding that the ICA "supersedes" whatever bargaining and status quo obligations C&NW might otherwise have with respect to the sale (App. 20a).[4] On June 26, 1989, this Court granted certiorari, vacated the Eighth Circuit's judgment, and remanded the case for further consideration in light of *Pittsburgh & Lake Erie R. Co.* v. *Railway Labor Executives' Ass'n*, 491 U.S. ——, 109 S. Ct. 2584 (1989) ("*P&LE*"). 109 S. Ct. 3207 (1989) (reprinted at App. 19a).

In *P&LE*, this Court held that a railroad's decision to sell all its rail lines, abolish all its railroad jobs, and leave the railroad business is a matter of management prerogative. Accordingly, such a railroad does not have an obligation under the RLA to bargain about the decision to sell or to postpone consummation of the sale in order to maintain the status quo. 109 S. Ct. at 2595-96. The Court further held that, if a union gives appropriate notice under § 6 of the RLA, such a carrier is obligated to bargain about the effects that the sale will have on its employees, but that obligation does not require the carrier to bargain about terms it has already negotiated

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[4] C&NW had raised two other alternative defenses to RLEA's action, each based solely on the RLA, not the ICA: (1) the decision to sell the line was a matter of managerial prerogative as to which the C&NW had no bargaining, and hence no status quo, obligations under the RLA; and (2) even if C&NW was obligated to bargain over the unions' demands for new agreements limiting C&NW's right to sell the line, C&NW's existing agreements at least arguably permitted its actions regarding its employees in connection with the sale (principally the abolishment of jobs), and so RLEA's status quo claim presented a "minor dispute" over the application and interpretation of agreements subject to mandatory arbitration under § 3 of the RLA, 45 U.S.C. § 153. Because the district court and the court of appeals (in its first opinion) decided the case on ICA grounds, neither court reached these issues.

with the purchaser or matters that would require the assent of the purchaser, does not require the carrier to bargain after the sale is closed and the company ceases to be a "carrier" subject to the RLA, and does not require postponement of the sale. *Id.* at 2595-96, 2597.

The Eighth Circuit requested letter briefs from the parties on the application of *P&LE* to this case, and on November 29, 1989, issued an order which "revise[d] [its] original opinion" (App. 2a). The court noted that it "must decide whether the Supreme Court's decision [in *P&LE*] that a railway company need not bargain with the unions with *respect to a sale of all of its assets* to another corporation applies to a case in which a railway company sells only a portion of its assets." (*Id.* (emphasis original).) The court held that, under *P&LE*, "C&NW was not required to bargain over the sale in this case prior to the sale's completion * * * nor was it obligated to maintain the status quo and postpone the sale beyond the time the sale was approved by the Commission and was scheduled to be consummated." (*Id.*) The court further held that, by virtue of the unions' notices and under *P&LE*, C&NW "is obligated to bargain with the unions with respect to the *effects* of the sale" on its employees (App. 5a (emphasis original)), and that, unlike the selling railroad in *P&LE*, which was leaving the railroad business, C&NW must bargain about these effects even after consummation of the sale (App. 3a). The court therefore vacated its original opinion and remanded the case to the district court "with directions that it enter an order requiring the C&NW to bargain on request of the Railway Labor Executives Association with respect to the effects of the sale on the employees of C&NW." (App. 5a.)[5]

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[5] Petitioners state that the Eighth Circuit on remand correctly rejected C&NW's alternative argument that the status quo claim was a minor dispute, and suggest in a footnote that this ruling put the Eighth Circuit in conflict with three other circuits. See Pet. at 7 & 8 n.4. The Eighth Circuit did not so hold. Rather, the court held only that the unions' § 6 notices proposing new labor protec-

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below does not conflict with decisions of the other courts of appeals or of this Court so as to warrant this Court's plenary review. The decision below is the only one by any court of appeals to determine whether the Court's decision in *P&LE* applies to a railroad's sale of part of its lines. In the absence of any conflict among the lower courts on the bargaining and status quo obligations in such cases, there is no basis for claiming that this Court needs to "put these questions to rest" (Pet. 17).

Moreover, the decision below is entirely consistent with *P&LE*, as well as the Court's earlier decisions in *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U.S. 330 (1960) (*"Telegraphers"*) and *Detroit & Toledo Shore Line R. Co.* v. *Transportation Union*, 396 U.S. 142 (1969) (*"Shore Line"*), upon which petitioners rely. In *P&LE*, this Court held that *Telegraphers* did not require a rail carrier to bargain about a decision to sell all its lines and abolish all its rail employees' jobs, and that *Shore*

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tions gave rise to a major dispute over those proposed changes to existing agreements (App. 3a-4a). Since the court also held that C&NW had no status quo obligation with respect to the sale, because the sale was within its managerial prerogative, the court had no occasion to reach C&NW's alternative argument that any such status quo claim would necessarily turn on the application of C&NW's existing agreements and thus raise a minor dispute. By contrast, in the three decisions that petitioners cite, other circuits held that the status quo claims presented a minor dispute over the carriers' rights under existing labor agreements. See *General Comm. of Adjustment* v. *CSX R.R.*, 893 F.2d 584, 589-93 (3d Cir. 1990); *CSX Transp., Inc.* v. *United Transp. Union*, 879 F.2d 990, 998-1002 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 720 (1990); *Chicago & N. W. Transp. Co.* v. *Railway Labor Executives' Ass'n*, 855 F.2d 1277, 1283-86 (7th Cir.), *cert. denied*, 109 S. Ct. 493 (1988). There is no inconsistency between a holding that a controversy between a carrier and a union over the adoption of a proposed *new* agreement is a major dispute, as in this case, and a holding that a status quo controversy over the interpretation and application of *existing* agreements is a minor dispute, as in the cases cited by petitioners.

Line did not require such a carrier to postpone the sale in order to preserve the status quo pending the completion of any bargaining obligations it had arising out of the sale. The same result should be reached in this case. Like the decision of the carrier in *P&LE* to leave the railroad business altogether, and the decision of the employer in *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), to terminate a part of its business, C&NW's decision to sell this line and thus close a part of its business was a matter of managerial prerogative. Accordingly, C&NW was not required to bargain over its decision to sell, the terms of the sale, or union proposals that would require the assent of DM&E, and C&NW was not required to postpone the sale or the abolishment of jobs until it satisfied any other bargaining obligations it might have arising out of the sale.

ARGUMENT

The petition contends that the Court should review the bargaining and status quo issues in this case in order to resolve "uncertainty" about the application of *P&LE* to a railroad's sale of part of its lines (Pet. 17). No conflicts have arisen among the lower courts, however, with respect to the question whether *P&LE*'s bargaining and status quo holdings apply to partial line sales. Indeed, the decision below is the only one by a court of appeals since *P&LE* to determine the bargaining and status quo obligations in a partial line sale case. Unless a divergence on these questions develops in the courts of appeals, there will be no need for further review by this Court.

Moreover, the decision below is fully consistent with the decisions of this Court, including *P&LE*, and does not conflict with any decisions of this Court about the bargaining and status quo obligations in partial line sale cases. In *P&LE*, this Court squarely held that the RLA does not require a rail carrier to bargain over its decision to sell its entire system, since that is a matter of man-

agerial prerogative, and that the RLA does not require such a carrier to bargain over union demands that would change the terms of sale or require the assent of the buyer, since such demands in effect challenge the decision to sell. 109 S. Ct. at 2593-97. The Court also held that the RLA's status quo provisions do not require such a carrier to postpone the sale until it has satisfied any duty it may have to bargain over union notices about the effects of the sale on its employees. *Id.* at 2595-97. Thus, "the decision of a railroad employer to go out of business and consequently reduce to zero the number of available jobs is not a change in the conditions of employment forbidden by the status quo provision of [§ 6 of the RLA]." *Id.* at 2596. The Court in *P&LE* principally relied upon the doctrine it had developed under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, that an employer's economic decision to close its business, *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965), or part of its business, *First National Maintenance*, 452 U.S. at 686, is a matter of managerial prerogative and not a mandatory subject of bargaining. See 109 S. Ct. at 2595 & n.17.

Although the court below followed each of these holdings in *P&LE*, petitioners contend nonetheless that it erred, because this Court somehow "explained" and "reaffirmed" in *P&LE* that the bargaining and status quo obligations of carriers in partial line sale cases are governed not by *P&LE*, but by the Court's earlier decisions in *Telegraphers* and *Shore Line* (Pet. 14, 16). According to petitioners, those two earlier cases, read in light of *P&LE*, show that a railroad's decision to cease operating a part of its business is a mandatory subject of bargaining under the RLA and cannot be implemented until the Act's major-dispute procedures are exhausted.

But that conclusion is not supported by those three cases. *Telegraphers* and *Shore Line* themselves do not purport to establish a rule governing the bargaining and status quo obligations for partial lines sales. Both of

those cases involved a change in operations along a carrier's existing lines, not a decision to shut down or sell one of its lines and thus close down part of its business. In *Telegraphers*, the railroad had proposed to consolidate or close some of its little-used railroad stations along some of its lines, thus necessarily reducing the number of jobs on those lines while continuing to do business on them. This Court held that the RLA required the railroad to bargain over a union notice that sought an agreement preventing the railroad from abolishing any union member's position without the union's consent. 362 U.S. at 338-41. In *Shore Line*, this Court held that the RLA's status quo provisions prohibited a railroad from changing the long-established location at which some of its employees began and ended their daily work. Even though the location of work assignments was not covered by the parties's existing express and implied collective agreements, the Court held that the status quo provisions of the Act applied, because that location was part of the "actual, objective working conditions" out of which the dispute arose. 396 U.S. at 153. Nothing in either case suggests that their holdings apply to a carrier's more fundamental decision to sell part of its lines and thus shut down part of its business.

Indeed, the Court's treatment of those cases in *P&LE* confirms that they do not apply to this case. In *P&LE*, RLEA argued that under *Telegraphers* and *Shore Line* a railroad was required to bargain over its decision to sell all its lines and had to fulfill that bargaining obligation before making the sale. The Court distinguished both cases, however, and refused to extend either of them to a case in which a railroad seeks to sell its lines and leave the railroad business. 109 S. Ct. at 2594-95 & n.17. "The dissent * * * seems to assert that *Shore Line* and *Telegraphers* dealt with a railroad's freedom to leave the market. But as we point out, that is precisely what those cases did not involve." *Id.* at 2595 n.17. For this reason, neither *Telegraphers* nor *Shore Line* required

C&NW to postpone and bargain over its decision to leave the market served by the Winona-Rapid City line.

Petitioners nevertheless assert that the decision below was in error, and that C&NW was required to bargain over its decision to sell in this case, because *P&LE* "declined to extend *First National Maintenance* to the rail industry" (Pet. 15-16). In *First National Maintenance*, this Court held that the decision to shut down a part of a business is a matter of managerial prerogative under the NLRA. 452 U.S. at 686. Nowhere in *P&LE*, however, did the Court address the application of its analysis in *First National Maintenance* to a case under the RLA. See 109 S. Ct. at 2595 n.17. In holding that a railroad's decision to sell all its lines is a matter of managerial prerogative and not a mandatory subject of bargaining under the RLA, the Court in *P&LE* relied principally upon its holding in *Darlington*, which *First National Maintenance* "reaffirmed," that an employer's decision to close a business is not a mandatory subject of bargaining under the NLRA. 109 S. Ct. at 2595 & n.17. The Court in *P&LE* did not further delimit the scope of mandatory bargaining under the RLA, and thus had no occasion to suggest that its analysis in *First National Maintenance* would not apply to partial line sales governed by the RLA.

In fact, the reasons the Court gave in *First National Maintenance* for concluding that the NLRA does not require an employer to bargain over its decision to close down part of its business apply under the RLA as well. The Court noted in *First National Maintenance* that an employer's decision to close down part of its business "involv[es] a change in the scope and direction of the enterprise" and "is akin to the decision whether to be in business at all." 452 U.S. at 677. That such a decision may result in the elimination of jobs did not mean the employer had to bargain over it: "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable busi-

ness. * * * [I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id.* at 678-79. The Court then held that "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision," and thus such a decision is not a mandatory subject of bargaining. *Id.* at 686. A railroad, no less than any other employer, needs the freedom to determine, without collective bargaining, the "scope and direction of [its] enterprise." No decision of this Court is to the contrary.[6]

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[6] Petitioners contend that footnote 17 of *P&LE* shows that the scope of mandatory bargaining is broader under the RLA than under the NLRA and extends to a partial line sale (Pet. 16). In this respect, however, *P&LE* refers only to *First National Maintenance*, 452 U.S. at 686 n.23, where the Court distinguished *Telegraphers* (in part because the scope of mandatory bargaining under the RLA is not "coextensive with" the NLRA) but, since the case before it arose under the NLRA, did not purport to determine the scope of the duty to bargain under the RLA.

In fact, the statutory language and legislative history suggest that the duty to bargain is narrower under the RLA than the NLRA. Section 6 of the RLA requires a carrier to bargain over "working conditions," and petitioners contend in this case that continued employment on the line was one of the "working conditions" over which C&NW was obligated to bargain. But that term is not as broad on its face as the otherwise similar term in §§ 8(a)(5) and (d) of the NLRA, 29 U.S.C. §§ 158(a)(5) & 158(d), which mandate bargaining with respect to "terms and conditions of employment." Justice Stewart, concurring in *Fibreboard Corp.* v. *Labor Board*, 379 U.S. 203, 217 (1964), observed that "[i]n common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment," *id.* at 222, but that the term is "susceptible

Petitioners further assert that, under *P&LE*, *Telegraphers*, and *Shore Line*, C&NW was obliged to bargain over the unions' demands that C&NW require D&ME to hire former C&NW employees and afford them the labor protections typically imposed by the ICC in rail mergers, demands which would have required C&NW to renegotiate its sales agreement and obtain the assent of DM&E (Pet. 16-17). The unions' notices in this case were not served before the terms of sale were settled, however, so that C&NW might be required somehow to incorporate the unions' proposals into its offer to D&ME. Thus, under the rule established in *P&LE*, C&NW was not obliged to bargain over union demands to the extent that they "could be satisfied only by the assent of the

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of diverse interpretaitons" and had been more broadly construed by the National Labor Relations Board ("NLRB") and the courts in reviewing its decisions, *id.* at 221-22. In rejecting a contention that "the term 'conditions of employment' has no broader meaning than that perhaps spontaneously suggested by the term 'working conditions,' and that it therefore refers to the physical conditions under which employees are compelled to work rather than to the terms or conditions under which employment status is afforded or withdrawn," the NLRB noted that Senator Wagner (sponsor of the NLRA) had stated in debates on amendments thereto, "that the term 'condition of employment' as used in the original Act was intended to have a broader meaning than 'working conditions' * * * (93 Congressional Record 3427)." *Inland Steel Co.*, 77 N.L.R.B. 1, 7, *enforced*, 170 F.2d 247 (7th Cir. 1948), *aff'd*, 339 U.S. 382 (1950). In enforcing that decision, the Seventh Circuit made a similar observation:

> "A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act. * * * Congress in the instant legislation used the phrase 'other conditions of employment,' instead of the phrase 'working conditions,' which it had used previously in the Railway Labor Act. We think it is obvious that the phrase which it later used is more inclusive than that which it had formerly used." *Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 254-55 (1948), *aff'd sub nom. American Communications Ass'n* v. *Doud*, 339 U.S. 382 (1950).

buyers," because such demands "sought to change or dictate the terms of the sale, and in effect challenged the decision to sell itself." *P&LE*, 109 S. Ct. at 2597. *P&LE* does not suggest that a railroad's decision to sell part of its lines should be treated any differently. *Telegraphers* and *Shore Line*, as already noted, did not involve line sales, and thus do not control here.

Finally, petitioners ignore this Court's admonition in *P&LE* that courts should be chary of construing the RLA so as to create conflict between that Act and the ICA. 109 S. Ct. at 2596-97. Petitioners argue that, notwithstanding the ICC's approval of this line sale, its consummation violated the RLA. Were that the rule, however, the two statutes would be brought into direct conflict every time a union serves a § 6 notice with respect to a partial line sale. Under the ICA, line sales to new carriers such as DM&E are authorized because they serve the public interest.[7] If the RLA prohibits, on the basis of the interests of employees, what the ICA authorizes as a matter of public interest, then the Court cannot "harmonize" the two statutes and " 'give effect to each,' " as the Court recognized in *P&LE* it should attempt to do, 109 S. Ct. at 2596, 2597. Adopting petitioners' construction of the RLA for partial line sales would compel the federal courts to reach the statutory accommodation issue. The decision below wisely avoided that course.

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[7] See *Ex Parte No. 392*, 1 I.C.C.2d at 812-15, 817.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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